United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-7344

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ETHEL BECKERMAN and ABRAHAM BECKERMAN, on behalf of themselves and all other participants in Times Square Associates, similarly situated,

Plaintiffs-Appellants,

-against-

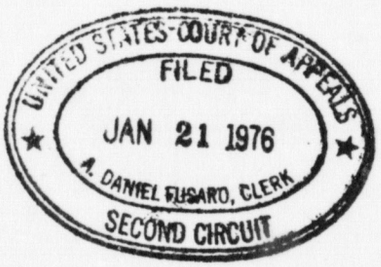
IRA JAY SANDS and F. S. MANAGEMENT CORP.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

B P/S

PETITION FOR RE-HEARING



SCHWARTZ, KAUFMANN & SKIAVER
Attorneys for Petitioners
and Plaintiffs-Appellants
Office & P.O. Address
115 Broadway
New York, N.Y. 10006

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I

The Court's order affirms the judgment below on the opinion of Judge Lasker dated March 20, 1975. That opinion directs the entry of judgment of dismissal without costs to either side. This Court's order of affirmance, by the failure to mention costs, grants costs to the defendants-appellees.

The record is clear that the defendants committed breaches of their fiduciary relationship with the plaintiffs and the members of the class. Judge Lasker so found in his earlier order of June 28, 1974 in which he granted plaintiffs an interlocutory summary judgment. His later order dismissing the amended complaint was based solely on the question of jurisdiction. It would be unjust and inequitable, under these circumstances, to burden the named plaintiffs with the payment of costs.

II

Defendants-appellees have filed a bill of costs of $602.97 for the typographic printing of the brief on this appeal (a copy is annexed hereto). While Rule 32 of the Federal Rules of Appellate Procedure permits typographic printing and while there is no contention that the price charged was computed at rates in excess of thos generally charged for typographic printing in the New York area (F.R.A.P. 39(c)), nevertheless, within the confines of this case the defendants-appellees should not be permitted to recover the cost of typographic printing. This Court well knows that there are far less expensive methods of preparing briefs for filing in this Court, including Xerox or other offset printing. Research has disclosed no case dealing with that issue in this Court, but the courts of New York have dealt with it. In Society of New York Hospital v. Mogensen, 81 Misc.2d 1089, the successful party on the appeal was not permitted to recover the cost of typographic printing but only the cost of an alternative method method of reproduction. The matter has been succintly stated in Lew Morris Demolition Co., Inc. v. Board of Education, 80 Misc. 2d 944:

> "If the movant, who is under no mandate to do so, but for what appears to be purely aesthetic reasons, has the record printed, it would be highly improper for this court to impose the cost of such printing on the plaintiff."

It should be noted that F.R.A.P. 32 does not require briefs to be typographically printed. The Rule permits it to be produced "by any duplicating or copying process which produces a clear black image

on white paper."

Thus, if this Court decides to allow costs, it should allow only the cost of producing the brief by an alternative method.

III

With respect to the merits of the appeal, it is submitted that the order affirming the judgment is contrary to this Court's decision in Miller v. First National City Bank of New York, 147 F.2d 798. While this Court's order of affirmance was on the opinion of Judge Lasker dated March 20, 1975, it is significant that Judge Lasker did not cite the Miller case in that opinion nor in any of his earlier opinions. In the Miller case, a syndicate of five banks had contracted with the Imperial Russian Government to grant a three year credit of up to $50,000,000. The syndicate raised the money from the public by the issue of participation certificates of which the plaintiff held a $5,000 certificate. The complaint alleged that the syndicate had misapplied an unexpended credit of $5,100,000 and it prayed for an accounting and rateable distribution of which the plaintiff's share was $510. This Court permitted aggregation of the claims and sustained jurisdiction. At pages 799-800 the Court said:

> "If a trust was created by the arrangements of the parties there can be no doubt that a foundation for a true class suit would exist. Handley v. Stutz, 137 U.S. 366, 11 S.Ct. 117, 34 L.Ed. 706; [other citations]. The same thing would be true if the certificate-holders, though having separate and distinct demands, had united to enforce a common right in a single lien securing their several interests.

> In that case the jurisdictional amount would be measured not by the amount of each separate claim sued upon by the value of the security. Troy Bank v. Whitehead & Co., 222 U.S. 39, 32 S.Ct. 9, 56 L.Ed. 81. We see no essential difference between such situations and the present one. When the plaintiff is seeking here is to compel Guaranty to restore to a fund which belonged to all the certificate-holders in common moneys it is said to have misapplied and then to make a distribution as ancillary to the primary relief. Even if Guaranty was a mere agent it might be charged with a breach of a fiduciary duty to realize upon the Russian credit, for the benefit of its principals, which credit it could not employ to its own advantage. The present action closely resembles a class suit by a stockholder to compel his corporation to enforce rights which the latter has refused or neglected to assert, to the detriment of its stockholders. The object sought to be gained by the suit is the restoration of the common fund of the $5,100,000 alleged to have been diverted. That the claims of the certificate-holders to share in the fund may have been several does not affect the issue. Had these certificate-holders brought an action simply for the distribution of a fund, rather than for restoration to a fund, the amount in controversy might perhaps have been measured only by the value of the claim of the individual holder. The fact that the plaintiff prays for distribution to the certificate-holders in addition to the primary relief asked cannot divest the court of jurisdiction. The amount in controversy, which is the whole $5,100,000, has not been reduced by the prayer for additional relief."

Snyder v. Harris, 394 U.S. 332, and Zahn v. International Paper Co., 414 U.S. 291, although decided later than the Miller decision, do not detract from the force of the Miller decision. The Snyder case which

formed the basis of the Zahn decision held only that Rule 23 does not affect the rule of aggregation of claims as originally enunciated in Pinel v. Pinel, 240 U.S. 594 and Clark v. Paul Gray, Inc., 306 U.S. 583, which were prior to the Miller case. Significantly, also, the Court in Miller relied upon two Supreme Court decisions, Handley v. Stutz, 137 U.S. 366 and Troy Bank v. Whitehead & Co., 222 U.S. 39.

It is submitted that the instant action seeks the same relief as did the Miller action. Here, plaintiffs seek restoration to Times Square Associates of the diverted amounts and a subsequent liquidating distribution by Times Square Associates to the investors of all its assets.

IV

In his decision granting defendant's motion to dismiss the amended complaint Judge Lasker did not address himself to the rule of law that when jurisdiction is once found the Court is not divested of it by subsequent facts which tend to show that the plaintiff cannot recover the requisite jurisdictional amount in controversy, Smithers v. Smith, 204 U.S. 632. See also, 1 Moore's Federal Practice, par. 0.91[3]. In this regard, it is significant that Judge Lasker found jurisdiction about a year and a half before his order of dismissal and on two occasions thereafter.

V

In his decision granting defendants motion to dismiss the amended complaint, Judge Lasker viewed the action solely as one for damages. Actually, however, it is more than that. The action seeks

a dissolution of Times Square Associates and a distribution of its assets to all the investors. It is alleged in the second count that the value of the assets which the investors seek is in excess of $1,100,000 (par. 28 of amended complaint). The theory of the claim is that since Mr. Sands breached his fiduciary duty the cestuis are entitled to terminate the relationship and recover the value of the res, Jewett v. Commonwealth Bond Corp., 241 App.Div. 131. When the value of the res is added to the amounts diverted from the trust (Times Square Associates), even excluding punitive damages, the total amount in controversy exceeds the minimum jurisdictional amount as to each investor.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for re-hearing be granted and that the judgment of the District Court be, upon further consideration reversed, but if not reversed, that this Court's order of affirmance be amended to provide that it should be without costs.

SCHWARTZ, KAUFMANN & SKLAVER

By: Harvey M Sklaver
A Member of the Firm
Attorneys for Petitioners and
Plaintiffs-Appellants
Office & P.O. Address
115 Broadway
New York, N.Y. 10006
Tel. No. 964-7660

CERTIFICATE OF COUNSEL

I Harvey M. Sklaver, a member of the firm of Schwartz, Kaufmann & Sklaver, attorneys for the petitioners and plaintiffs-appellants, do hereby certify that the foregoing petition for a re-hearing of this cause is presented in good faith and not for purposes of delay.

Harvey M. Sklaver

HARVEY M. SKLAVER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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-against-

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Counsel for Defendants-Appellees respectfully submits, pursuant to Rule 39(c) of the Federal Rules of Appellate Procedure the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the plaintiffs-appellants and in favor of defendants-appellees for insertion in the mandate.

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WEINSTEIN & LEVINSON

By Frank Weinstein
Frank Weinstein
A member of the firm.

Counsel for Defendants-Appellees.

Sworn to before me this
14th day of January, 1976.

Notary Public

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